Outdoor Venture Corporation (O.V.C.) *and* Union of Needletrades, Industrial and Textile Employees (UNITE) Tennessee & Kentucky Division. Case 9–CA–34709

February 19, 1999

DECISION AND ORDER DENYING MOTION

BY CHAIRMAN TRUESDALE AND MEMBERS FOX AND LIEBMAN

The main issue presented by the Respondent's Motion for Summary Judgment is whether a settlement agreement in a prior case bars litigation of the complaint allegation in this case that a strike by the Respondent's employees was converted to an unfair labor practice strike.[1] For the reasons set forth below, we find that the settlement agreement in the prior case specifically reserved the General Counsel's right to use the settled conduct for the purpose of establishing the unfair labor practice strike allegation in the instant case. Accordingly, we shall deny the Respondent's Motion for Summary Judgment.

I. FACTS

The following facts are undisputed.[2] The Respondent is engaged in the manufacture of military tents at a facility in Stearns, Kentucky.[3] Since about 1980, the Union or its predecessor have been recognized as the exclusive collective-bargaining representative of the Respondent's production and maintenance employees. The most recent collective-bargaining agreement was effective from December 7, 1992, to November 6, 1995. From about August 12, 1996, to about February 26, 1997, certain unit employees engaged in a strike and established a picket line at the Respondent's Stearns facility. In August and September 1996, Larry A. Lockhart and James C. Egnew, supervisors and agents of the Respondent, allegedly threatened plant closure if the employees remained on strike and engaged in direct dealing with employees at the picket line.

On November 27, 1996, the Union filed a charge in Case 9–CA–34369 alleging that the plant closure threats and direct dealing violated Section 8(a)(1) and (5) of the Act. On January 2, 1997, the Respondent entered into a unilateral informal settlement agreement in Case 9–CA–34369 which was approved by the Regional Director on January 31, 1997.[4]

The settlement agreement contained the following "SCOPE OF THE AGREEMENT" clause:

> This Agreement settles only the allegations in the above-captioned case(s), and does not constitute a settlement of any other case(s) or matters. It does not preclude persons from filing charges, the General Counsel from prosecuting complaints, or the Board and the courts from finding violations with respect to matters which precede the date of the approval of this Agreement regardless of whether such matters are known to the General Counsel or are readily discoverable. The General Counsel reserves the right to use the evidence obtained in the investigation and prosecution of the above-captioned case(s) for any relevant purpose in the litigation of this or any other case(s), and a judge, the Board and the courts may make findings of fact and/or conclusions of law with respect to said evidence.

The Union declined to enter into the settlement agreement, and on February 5, 1997, the Regional Director advised the Union that in view of the settlement agreement, it would not effectuate the purposes of the Act to initiate further proceedings in Case 9–CA–34369. The Union did not appeal the Regional Director's action.

On February 26, 1997, the Union terminated the strike and made an unconditional offer to return to work on behalf of the striking employees. The Respondent refused to offer immediate reinstatement to the striking employees on the ground that they had been permanently replaced and no vacancies existed at that time.[5]

On March 13, 1997, the Union filed the instant charge alleging, inter alia, that the Respondent violated Section 8(a)(3) and (1) by refusing to offer immediate reinstatement to the striking employees on their unconditional offer to return to work. On June 4, 1997, the Regional Director issued a complaint alleging, inter alia, that the work stoppage engaged in by the Respondent's employees was an unfair labor practice strike at the time the employees made their unconditional offer to return to work and that the Respondent's failure to offer the employees immediate reinstatement violated Section 8(a)(3) and (1). The conduct alleged to have prolonged the strike and converted it into an unfair labor practice strike was the threats and direct dealing alleged as unlawful in settled Case 9–CA–34369. The complaint does not seek any additional remedy for those alleged violations, but requests the Board to make findings of fact and conclu-

[1] On August 7, 1997, the Respondent filed a Motion for Summary Judgment and a supporting brief. On August 28, 1997, the Board issued an order transferring the Proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The General Counsel and the Union each filed briefs in response to the Motion for Summary Judgment. The Respondent filed a reply brief.

[2] For the purpose of the Motion for Summary Judgment, the Respondent does not dispute the allegations of pars. 1 through 11, 13, 14(a), and 19 of the complaint.

[3] The Respondent admits that it is an employer engaged in commerce within the meaning of Sec. 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Sec. 2(5) of the Act.

[4] The settlement agreement provided that "[u]pon approval," the Respondent would post a Notice to Employees for at least 60 consecutive days. The Respondent alleges that it posted a Notice to Employees on January 2, 1997, and that the notice remained posted for at least 60 days thereafter.

[5] The Respondent contends that the strikers were economic strikers rather than unfair labor practice strikers.

sions of law that the Respondent engaged in unfair labor practices by the conduct alleged in Case 9–CA–34369, that those unfair labor practices prolonged the strike and converted it into an unfair labor practice strike, and that the striking employees were unfair labor practice strikers entitled to immediate reinstatement upon their unconditional offer to return to work.

II. CONTENTIONS OF THE PARTIES

The Respondent raises three alternative arguments in support of its Motion for Summary Judgment. First, the Respondent contends that the conduct alleged to have violated Section 8(a)(1) and (5) in Case 9–CA–34369 cannot form the basis for the 8(a)(3) and (1) violations alleged in the instant case because those are the same allegations previously settled by the Respondent. Relying on *Jackson Mfg Co*., 129 NLRB 460 (1960), the Respondent argues that its compliance with the terms of the settlement agreement bars the General Counsel from alleging that the conduct that was the subject of the settlement agreement was a violation of the Act, and that without such a finding, the Board cannot find that the strike was converted to an unfair labor practice strike. The Respondent maintains that the reservation language in the settlement agreement does not require a different result because the General Counsel reserved the right only to use the "evidence" gathered in Case 9–CA–34369, not to reassert or reallege the violations being settled. The Respondent states that it would make a "mockery of this settlement" if the litigation of the settled allegations is allowed in the instant case because in that event compliance with the settlement agreement will have bought the Respondent "nothing."

Second, the Respondent argues, in the alternative, that it is entitled to summary judgment because the strike was an economic strike when the offer to return was made. Assuming arguendo that the strike was converted to an unfair labor practice strike in August and September 1996, the Respondent maintains that the settlement agreement and notice posting on January 2, 1997, reconverted the strike to an economic strike.

Third, the Respondent further argues in the alternative that paragraphs 5(a) and 10 of the complaint alleging direct dealing and threats are barred by Section 10(b) of the Act because those events occurred more than 6 months before the instant charge was filed.

In response to the Respondent's first argument, the General Counsel and the Union assert that the settlement agreement in Case 9–CA–34369 does not bar a finding in the instant case that the Respondent engaged in the unfair labor practices alleged in the settled case and that the strike was converted into an unfair labor practice strike as a result of those violations. They contend that the settlement agreement specifically reserves the right of the General Counsel to use the presettlement conduct for any relevant purpose in the litigation of any other case, and allows a judge, the Board, or the courts to make findings of fact and conclusions of law with respect to the settled conduct if, as here, it is necessary to support a violation in a subsequent proceeding.[6] The General Counsel and the Union maintain that this reservation language distinguishes this case from *Jackson Mfg*., relied on by the Respondent.[7]

The Union also argues that matters of striker reinstatement, strike conversion, and replacement hiring are not part of the settled case and are reserved from the settlement as an "other" case.[8] The Union further asserts that the settled unfair labor practices may be used as background evidence to shed light on the Respondent's postsettlement failure to reinstate. The Union argues that an employer should not be permitted to escape its obligations to reinstate unfair labor practice strikers with backpay merely by agreeing to post a notice in the settled case. The Union suggests that it is unfair to place the burden on the General Counsel and the Union to investigate the relationship between an ongoing strike and alleged unfair labor practices before accepting a settlement concerning the unfair labor practices, when the nature of the strike is not yet, and may never become, an issue.

In response to the Respondent's second contention, the General Counsel and the Union maintain that the strike was not reconverted to an economic strike at the time the unconditional offer to return was made. Here, the offer to return was made 26 days after approval of the settlement agreement and before the end of the posting period. Because the posting period was still in effect, the unfair labor practices in Case 9–CA–34369 were not fully remedied at the time of the offer to return.

The General Counsel and the Union contend in response to the Respondent's third contention that none of the allegations in the instant complaint are barred by Section 10(b).[9] The General Counsel is not seeking a remedy for any conduct that occurred more than 6 months before the March 13, 1997 charge. The only alleged unfair labor practice for which a remedy is sought is the February 26, 1997 refusal to immediately reinstate the unfair labor practice strikers. The Board rejected a similar 10(b) contention in *Council's Center for Problems of Living*, 289 NLRB 1122 (1988), enf. denied on other grounds 897 F.2d 1238 (2d Cir. 1990).

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[6] The General Counsel and the Union are not seeking a new remedy for the previously settled allegations.

[7] The Union argues in the alternative that *Jackson* should be reconsidered by the Board.

[8] The Union points out that the issue of whether an employer initially violated the Act is often litigated separately from the issues of whether the violation caused or prolonged a strike. *Colonial Press*, 207 NLRB 673, 677 fn. 3 (1973), enfd. in part 509 F.2d 850, 854 (8th Cir. 1975), cert. denied 423 U.S. 833 (1975).

[9] The Union argues that even if the August and early September allegations are time-barred, the timely late September allegations are sufficient to have prolonged the strike.

III. ANALYSIS

For the following reasons we find, in agreement with the General Counsel and the Union, that summary judgment is not appropriate in the instant case.

1. We find no merit to the Respondent's first contention that the settlement agreement in Case 9–CA–34369 barred the General Counsel from litigating the status of the strikers in this case.

In *Hollywood Roosevelt Hotel Co*., 235 NLRB 1397 (1978), the Board held that "a settlement, if complied with, will be held to bar subsequent litigation of all prior violations except where they were not known to the General Counsel or readily discoverable by investigation or were *specifically reserved from the settlement* by mutual understanding of the parties." [Emphasis added.] The issue here is whether the "SCOPE OF THE AGREEMENT" clause in the settlement agreement specifically reserved the General Counsel's right to litigate the settled plant closure threats and direct-dealing allegations in order to establish that the strikers, whom the Respondent allegedly unlawfully refused to reinstate, were unfair labor practice, rather than economic, strikers.[10]

As quoted above, the third sentence of the "SCOPE OF THE AGREEMENT" clause states as follows: "The General Counsel reserves the right to use the evidence obtained in the investigation and prosecution of the above-captioned case(s) for any relevant purpose in the litigation of this or any other case(s), and a judge, the Board and the courts may make findings of fact and/or conclusions of law with respect to said evidence." Although the Respondent maintains that this term reserved the General Counsel's right only to use evidence of presettlement conduct to support allegations of postsettlement unfair labor practices, not to reallege the violations being settled, this interpretation is not a reasonable reading of the language in question. As the General Counsel asserts in his opposition brief,

> [i]t would be meaningless and illusory to include such a reservation of rights clause in a settlement agreement for the sole purpose of allowing presettlement conduct to be introduced as evidence, since Counsel for the General Counsel could do this without such reservation language.[11] Rather, it is clear that the reservation of rights provision is intended to permit a judge, the Board and the Courts to make findings of fact and conclusions of law with respect to the settled issues, if necessary, to reach a violation in a subsequent proceeding.

We agree with the General Counsel and the Union that use of presettlement conduct for the purpose of establishing the unfair labor practice strike allegation in the instant case falls within the phrase, "any relevant purpose in the litigation of . . . any other case." Thus, we find that the General Counsel may use the evidence concerning the Respondent's alleged direct dealing and plant closure threats to show that these actions prolonged the strike. The clause further allows "findings of fact" and "conclusions of law" to be made with respect to such evidence. Therefore, a judge, the Board, and the courts may make legal conclusions that the direct dealing and plant closure threats constituted unfair labor practices that prolonged the strike, and that consequently the strike was converted to an unfair labor practice strike and the strikers are entitled to immediate reinstatement upon their unconditional offer to return.

Council's Center for Problems of Living, 289 NLRB 1122, 1141–1143 (1988), supports our finding that there is no settlement bar here. In that case, the Board adopted an administrative law judge's conclusion that a reservation of rights provision similar to that used here[12] was sufficient, under the particular facts of that case, to reserve the General Counsel's right to litigate in a subsequent proceeding whether the settled conduct supported an unfair labor practice strike finding. The court of appeals agreed with the Board. 897 F.2d 1238, 1245 (2d Cir. 1990).

Jackson Mfg. Co., 129 NLRB 460 (1960), relied on by the Respondent, is clearly distinguishable. In that case, the Board held that a finding that a work stoppage was an unfair labor practice strike could not be predicated on conduct settled in a prior case, unless the respondent's subsequent conduct demonstrated that the settlement agreement had failed in its purpose. However, unlike the instant case, there was no reservation language in the settlement agreement permitting the judge, the Board, or the courts to make findings of fact and conclusions of law with respect to the settled conduct.

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[10] In *B & K Builders*, 325 NLRB 693 (1998), we addressed a related issue, i.e., whether the "SCOPE OF THE AGREEMENT" clause specifically reserved the General Counsel's right to litigate new allegations of unlawful presettlement conduct. In that case, the parties entered into an agreement settling allegations of polling, interrogation, promises of wage increases, and threats of discharge. The new allegations involved the actual granting of wage increases and the creation of impression of surveillance. The Board held that "the clear and specific terms of the reservation language in the settlement agreement permit[ted] litigation of the allegations of unlawful presettlement wage increases and surveillance."

[11] Under the well-established rule of *Laborers Local 185 (Joseph's Landscaping),* 154 NLRB 1384 fn. 1 (1965), presettlement conduct may be considered as background evidence in determining the motive or object underlying a respondent's postsettlement conduct.

[12] The settlement agreement contained a provision stating that the settlement did not preclude the introduction of any evidence contained in the settled cases by any party in any forum or proceeding. The agreement also provided that the agreement settles only the "charges in [the settled cases] and does not settle any other [pending] cases" nor "constitute a waiver of any claim that a party may have." Thus, the "SCOPE OF THE AGREEMENT" clause at issue in the instant case is even more specific than the provisions at issue in *Council's Center* inasmuch as it explicitly permits a judge, the Board, or the courts to make "findings of fact" and "conclusions of law" with respect to the settled conduct.

The Respondent argues that if the General Counsel is allowed to litigate the settled allegations in the context of this case, its settlement would have bought it "nothing." The Respondent, however, was under no obligation to accept the "SCOPE OF THE AGREEMENT" clause. Having entered into the settlement agreement containing that clause, however, the Respondent is bound by its clear and specific terms.

For these reasons, we find that the settlement agreement in Case 9–CA–34369 does not bar the litigation of settled allegations in the instant case.

2. We reject the Respondent's second argument that summary judgment is appropriate because the execution of the settlement agreement and notice posting reconverted the work stoppage at the Respondent's facility to an economic strike prior to the employees' unconditional offer to return to work.

In order to find that the strike had reconverted to an economic strike at the time of the offer to return, the unfair labor practices allegedly prolonging the strike (i.e., the settled allegations) must have been fully remedied.[13] Here, the posting period began on January 31, 1997, the date the Regional Director approved the settlement agreement.[14] At the time of the offer to return to work on February 26, 1997, the remedial notice had been posted less than half of the 60 days required by the settlement agreement. Even if we were to find, consistent with the Respondent's position, that the posting period began on January 2, 1997, when it alleges that it first posted the notice, the full 60 days would not have elapsed when the offer to return to work was made. Nevertheless, the Respondent argues that the notice was posted for "almost two months" and that this period "was more than ample time to remove the prolonging effect, if any, of the violations which allegedly occurred in August and September of 1996." We disagree.

The Board has stated that "the posting of a remedial notice for a 60-day period . . . is necessary as a means of dispelling and dissipating the unwholesome effects of a respondent's unfair labor practices. . . . Consequently, the 60-day posting requirement is not to be taken lightly or whittled down as the purpose of the notice is to provide sufficient time to dispel the harmful effects" of a respondent's unlawful conduct.[15] We reject any assertion that strict enforcement of the 60-day minimum period is overly technical, particularly where, as here, the posting of the notice was the only affirmative action the settlement agreement required the Respondent to take.[16] Inasmuch as the 60-day posting period was still in effect at the time of the employees' unconditional offer to return, we cannot find that the unfair labor practices allegedly prolonging the strike were fully remedied or that the strike was converted into an economic strike at that time.

Carlsen Porsche Audi, Inc., 266 NLRB 141 (1983), relied on by the Respondent, is distinguishable. There, the employees offered to return to work 4 months after approval of the settlement agreement and well after the posting period would have ended. Under those circumstances, the administrative law judge found that the strike would have converted to an economic strike at the time of the offer to return because by then the presettlement unfair labor practices would have been fully remedied. By contrast, the posting period here was still in effect and the offer to return was made less than 1 month after the approval of the settlement agreement. Accordingly, the unfair labor practices were not yet fully remedied when the employees' offer to return was made. We therefore reject the Respondent's contention that summary judgment is appropriate because the strike had reconverted to an economic strike by the time of the unconditional offer to return to work.

3. We also reject the Respondent's third argument that the allegations in the instant complaint are barred by Section 10(b) of the Act. Although the August 13 and September 10, 1996 conduct alleged in the complaint occurred more than 6 months before the filing of the instant charge, the litigation of these allegations is not barred by Section 10(b) because the General Counsel is not seeking a remedy for those allegations. Rather, the litigation of the pre-10(b) period conduct is required only to establish that the strike was an unfair labor practice strike. The only allegation for which the General Counsel seeks a remedy is the refusal to offer the strikers immediate reinstatement, conduct occurring well within the 10(b) period.

The Board rejected a similar 10(b) contention in *Council's Center for Problems of Living*, supra at fn. 3. There, the Board found that the predicate facts (the pre-

[13] See *Chicago Beef Co*., 298 NLRB 1039, 1040 (1990), enfd. mem. 944 F.2d 905 (6th Cir. 1991).

[14] See fn. 4, supra.

[15] *Chet Monez Ford*, 241 NLRB 349, 351 (1979), enfd. 624 F.2d 193 (9th Cir. 1980).

[16] Because there was no remedial action other than the notice posting, this case is also distinguishable from *Mohawk Liqueur Co*., 300 NLRB 1075, 1086 (1990), affd. sub nom. *Distillery Workers Local 42 v. NLRB*, 951 F.2d 1308 (D.C. Cir. 1991). The judge, whose reasoning was adopted by the Board, there held that a strike that commenced as an unfair labor practice strike (because it was motivated by the employer's refusal to pay contractually required cost-of-living (COLA) adjustment) was converted to an economic strike after the employer paid the COLA, even though the employer did not satisfy all the standards for curing a violation set forth by *Passavant Memorial Area Hospital*, 237 NLRB 138 (1978). Because the *Passavant* standards were not met, the judge found a violation on the basis of the COLA withholding and gave an appropriate remedy; but the judge concluded that the evidence established that after the employees received the COLA payment, the earlier failure to pay it played no part in their subsequent vote to continue the strike. This was a factual finding, made on a complete trial record, consistent with the Board's test as stated in *Chicago Beef Co*., supra, 298 NLRB at 1040—whether attempted remedial efforts "cure the unfair labor practice or otherwise remove it as a factor in prolonging the strike." There is no such record here; and we certainly cannot hold on a motion for summary judgment that a notice posted for less than the full remedial period necessarily changed the character of the strike.

10(b) settled allegations) "are not remedied by our decision, but merely indicate the nature of the later . . . conduct examined in the complaint." Accordingly, we find no impediment to the litigation of the pre-10(b) period conduct to establish the status of the strikers and to resolve the legality of the Respondent's alleged refusal to offer the strikers immediate reinstatement upon their unconditional offer to return.[17]

[17] We note that even if the litigation of the August 13 and September 10, 1996 allegations was barred by Sec. 10(b), the complaint contained other similar allegations of conduct occurring in late September, within the 10(b) period, that was also alleged to have converted the strike to an unfair labor practice strike. Accordingly, Sec. 10(b) would not require the dismissal of the complaint in any event.

ORDER

It is ordered that the Respondent's Motion for Summary Judgment is denied.

IT IS FURTHER ORDERED that this case is remanded to the Regional Director for Region 9 for further appropriate action.